United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-2020

In The

United States Court of Appeals

For The Second Circuit

CALVIN WILLIAMS,

Petitioner-Appellant,

- against -

Attorney General of the State of New York, District Attorney for the County of Kings, Corporation Counsel for the City of New York, Commissioner, New York City Department of Corrections, and Presiding Justice of the Supreme Court, Kings County, Part 27,

Respondents-Appellees.

On Appeal From the United States District Court for the Eastern District of New York

BRIEF FOR PETITIONER-APPELLANT

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases Cited:

Statutes Cited:

Title 28, United States Code:

New York State Criminal Procedure Law:

Rules Cited:

Federal Rules of Appellate Procedure:

Federal Rules of Criminal Procedure :

Other Authority:

I STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Was petitioner denied the protection of the Self Incrimination Clause of the Fifth Amendment, applicable to the States by virtue of the Fourteenth Amendment, by the prosecutor's comments on summation and/or the court's charge to the jury?

1. May a trial judge affirmatively charge a petit jury on the defendant's clear right under law to testify as a witness in his own behalf and on the fact that such right was not exercised, particularly when the defendant testified before a grant jury, and the petit jury must determine whether such testimony was perjurious?

2. Did the prosecution's comments on summation prejudice the petitioner by placing the burden on him, in the eyes of the jury, to produce evidence in his own behalf?

II. STATEMENT OF THE CASE

a. The Course of Proceedings

Petitioner-appellant was indicted by the December 1970 Term, Fourth Additional Grand Jury of Kings County, and accused of the

crime of perjury in the first degree, in a one count indictment.

This indictment and the subsequent two trials were based on the allegation that Williams testified falsely before the grand jury on June 26, 1972 that he was the driver of a motor vehicle which was involved in an accident with two parked cars on August 9, 1970. The grand jury charged that it was conducting an investigation of this traffic accident, and that in fact Williams was not the operator of the car in question.

On December 15, 1973 the first trial on this indictment ended in a declaration of a mistrial when, after two days of deliberations, the jury reported that it was "absolutely impossible" to agree "after reviewing all the evidence". (Petitioner-appellent's Exhibit at A178-A179).

The second trial began on June 28th and concluded on July 5, 1974. After deliberating just over three hours (Petitioner's Exhibit at A168-A172), a verdict of guilty was returned by the jury. On September 25, 1974 Williams was sentended to serve an indefinite term of imprisonment not to exceed six months.

This judgment of conviction was affirmed by the Appellate

Division of the New York State Supreme Court, Second Department, on June 19, 1975, without opinion. (Appellant's Appendix at 16a). Petitioner's application for leave to appeal the Appellate Division's affirmance of his judgment of conviction, was denied by the New York Court of Appeals on December 10, 1975. (Appellant's Appendix at 17a).

By verified petition, duly sworn to on the 30th day of December, 1975, Williams petitioned the United States District Court for the Eastern District of New York (Thomas C. Platt, J.), pursuant to Title 28, United States Code, Sections 2241 and 2254 for a Writ of Habeas Corpus discharging him from custody on the grounds that the judgment of conviction was imposed in violation of his right against self-incrimination under the Fifth Amendment to the United States Constitution, applicable to the States by virtue of the Fourteenth Amendment, owing to the prosecutor's comments on summation and the court's charge to the jury.

By opinion and order dated January 27, 1976, Williams' motion and petition for a Writ of Habeas Corpus were denied by the District Court, on the authority of United States v. Van Drunen, 501 F.2d 1393 (7th Cir.), cert. denied, 419 U.S. 1091 (1974). Pursuant to Title 28, U.S.C., Section 2253 and Rule 22 of the

Federal Rules of Appellate Procedure, a certificate of probable cause was issued by Judge Platt on February 17, 1976.

b. Statement of the Relevant Facts

The testimony elicited from the prosecution's witnesses at trial was to the effect that the driver of a dark blue Dodge automobile proceeding down Marion Street in Brooklyn on August 9, 1970 swerved to avoid a dog running across the street and struck two parked cars. The driver stopped his car immediately. He was described as a young, black male. Property damage which resulted from the impacts was minor. A civil action instituted against Williams for such damage by the family of the prosecution's witnesses, was resolved by settlement prior to trial. (Petitioner's Exhibit at A12- A13; A21). At the criminal trial these witnesses denied that Williams, with whom they had entered into a settlement of their civil claims, was the driver of the blue Dodge.

With the conclusion of the prosecution's case, the defense called as it's only witness a police officer who responded to the scene of the accident. The defendant did not testify in his own behalf, although he had testified before the grand jury investigating this traffic accident.

After the defense rested, the court inquired of defense counsel: "I assume too you want me to charge failure to take the stand in this case". Defense counsel replied in the affirmative. (Petitioner's Exhibit at A66).

New York State Criminal Procedure Law (CPL), Section 300.10(2) provides:

> "Upon request of a defendant who did not testify in his own behalf, but not otherwise, the court must state that the fact that he did not testify is not a factor from which any inference unfavorable to the defendant may be drawn."

Defense counsel's summation, in part, was directed to the failure of the prosecution to establish who in fact was the owner and/or driver of the dark blue Dodge, identified by the prosecution's witnesses as the car involved in the accident. (Petitioner's Exhibit at A87-A90; A96-A97; A106).

> "And I must come back to this very simple point because it seems to me, and nothing was ever said about it because Mr. Friedman (the prosecutor) didn't have it to present to you and I ask you when you go into that jury room to ask yourselves over and over again and to ask each other over and over again if Mrs. Williams (a prose-

> cution witness) had the license plate number of the '67 Dodge, why weren't all the people available to make an inquiry, able to determine its true owner and then after determining the true owner, conduct an investigation to determine who may have been driving that car. And the answer to that question is - and you can be sure if the answer was any different that I suggest to you Mr. Friedman would have had that information in here - the answer to that question is there was no Dodge, there was no young man. Mr. Williams was the man that drove the car that caused the damage that resulted in th e Dantzler's suit to recover". (Petitioner's Exhibit at A106).

The prosecutor, in his summation, attempted to respond to the lack of evidence on who was the owner and/or driver of the automobile by shifting the burden onto Williams.

> "Well, ladies and gentlemen, there is no testimony as to who the owner is. And the owner at the time of the accident could have been anyone in the State of New York including the defendant. And I submit to you that that does not have a bearing on this case because like the Peo= ple can pay $2.00 and get the owner and do a little investigation, the defendant can pay the $2.00 and do a little investigation, although he doesn't have to make no bones about that. But he could if he wanted to. (Petitioner's Appendix at 19a).

With the conclusion of the summations, defense counsel reiterated his prior request, "so the record will reflect that I have already requested of your Honor, the defendant specifically requests that the Court charge with respect to failure of the defendant to take the stand." (Petitioner's Appendix at 20a).

In response, the Court charged the jury as follows:

> "Now I want to make it clear to you that under our law the defendant may testify as a witness in his own behalf. In this case the defendant did not take the stand in his own behalf, however, the fact that he did not testify is not a factor from which any inference whatsoever unfavorable to the defendant may be drawn." (Petitioner's Appendix at 26a-27a).

The Court then began to read the one count indictment to the jury, but stopped, and digressed by explaining to the petit jury the nature, composition, powers and functions of the indicting grand jury. (Petitioner's Appendix at 28a - 30a). The court then read the grand jury's indictment to the petit jury, noted that "the defendant actually testified before the Grand Jury" (Appendix at 31a) and re-read the defendant's testimony before the grand jury "so you will be clear in your own mind as to actually what he did testify to before the Grand

Jury." (Appendix at 32a).

With the conclusion of the Court's charge, defense counsel took express exception:

> "to the Court's charge with respect to the failure of the defendant to take the stand on the grounds that (in) the opinion of counsel (it) was inadequate to cover the particular point."

The Court replied, "You have an exception."

New York State Criminal Procedure Law, Section 470.05(2) provides:

> "For purposes of appeal, a question of law with respect to a ruling or instruction of a criminal court during a trial or proceeding is presented when a protest thereto was registered, by the party claiming error, at the time of such ruling or instruction or at any subsequent time when the court had an opportunity of effectively changing the same. Such protest need not be in the form of an 'exception' but is sufficient if the party made his position with respect to the ruling or instruction known to the Court."

The "Practice Commentary" to CPL Section 470.05 states:

> "(A)n 'objection' or other inartistically phrased but meaningful complaint with respect to some phase of the charge would be sufficient to preserve a point of law for appellate consideration."

III. ARGUMENT

POINT I: THE PETITIONER WAS DENIED THE PROTECTION OF THE SELF INCRIMINATION CLAUSE OF THE FIFTH AMENDMENT BY VIRTUE OF THE PROSECUTOR'S COMMENTS ON SUMMATION AND THE COURT'S CHARGE TO THE JURY.

(a)

In response to defense counsel's remarks on the failure of the prosecution to present any evidence of who was the owner of the Dodge automobile, the prosecutor, in summation, argued that the owner "could have been ... the defendant", and further, that just as the prosecution could have found out who owned the car "and do a little investigation," so also the defendant can "do a little investigation, although he doesn't have to ... But he could if he wanted to."

The trial court, in its charge, twice noted that the defendant "actually testified before the Grand Jury" and read a portion of that testimony to the jury. Additionally, the court pointed out that the indicting grand jury was "chosen and duty bound and sworn to inquire into crimes committed in the County of Kings and to conduct investigations concerning crimes and criminals, criminal activities in the County of Kings." The court continued, "they have the power to subpoena any witness," and "All people must obey subpoenas of the Grand Jury. Unless a justice of the Supreme Court ... vacates the subpoena, everyone must obey it." (Appendix at 28a-30a).

Thus, in a situation where a defendant was charged with perjury in his testimony before a grand jury, but did not testify regarding such charge before the petit jury, the trial court did not instruct the jury that the law does not compel a defendant in a criminal case to take the witness stand and testify, nor that unlike a witness subpoenaed before the grand jury, the petitioner was not required to testify at his trial. The jury was not instructed that the petitioner had an absolute right to stand mute before the petit jury; and that while the petitioner did take the witness stand before the grand jury, he was under no obligation to do so at his trial.

Instead, the court first affirmatively informed the jury of

the petitioner's "clear" right "under our law" "to testify as a witness in his own behalf" before the petit jury. The court then made note of the fact that the petitioner did not choose to exercise that right. After noting for a third time that the defendant did not testify at the trial, the court in accordance with CPL Section 300.10(2) simply stated that this "is not a factor from which any inference whatsoever unfavorable to the defendant may be drawn."

At the conclusion of the court's charge, defense counsel took express exception to these instructions "with respect to the failure of the defendant to take the stand on the grounds that ... (it) was inadequate to cover the particular point." The court chose not to add to or in any respect modify these instructions.

The District Court, relying on United States v. Van Drunen, 501 F.2d 1393, 1395-1396 (7th Cir.), cert. denied, 419 U.S.1091 (1974), denied the petition for a writ of habeas corpus on the ground that if the instructions of the trial judge in Van Drunen did not constitute reversible error, than a fortiori the instructions in the case at bar "should not constitute a violation of his constitutional rights." (Appendix at 56a).

(b)

Van Drunen is distinguishable from and, on the contrary,

supportive of the present matter for the following reasons:

a. Van Drunen involved an appeal from a conviction of illegally transporting aliens. This case, in contrast, involves an appeal arising out of the petitioner's appearance and testimony before a grand jury, and the exercise of his constitutional right not to testify before the petit jury. A situation clearly of greater potential for prejudice by virtue of the totally different nature of the charges.

b. Van Drunen was an appeal from a conviction in a federal district court. Relying upon Rule 30 of the Federal Rules of Criminal Procedure, which requires a distinct statement of the matter objected to and the grounds for such objection, the Court of Appeals ruled that the issue of the challenged portion of the charge was not properly preserved for appellate review.

In the instant matter, however, the standard for preserving an issue for appellate review was governed by state statute (Section 470.05(2) CPL), rather than federal, and was duly satisfied by counsel's exception "to the Court's charge with respect to the failure of the defendant to take the stand on the grounds that (in) the opinion of counsel (it) was inadequate to cover the particular point." Inadequate is defined as insufficient, not equal to what is required,

unsuitable to the case, unsatisfactory, and lacking in effectiveness or in conformity to a prescribed standard. Such "protest" although arguably "inartistic", made counsel's "position with respect to the ... instruction known to the court," all that is required by state law.

c. The Court in Van Drunen at least impliedly noted that it indeed was error for the trial judge to have charged in the affirmative that "A defendant has the absolute right to testify." The Court found, however, that the judge "inadvertently omitted" the word "not" after "absolute right." Since there had been no sufficient objection, under federal standards, relative to that portion of the charge, the omission of the word was ruled not an "incurable ground for a mistrial." See also, United States v. Martin, 511 F.2d 148, 152 (8th Cir. 1975).

Here, the error was not "inadvertent," but intentional, and as noted, was preserved for appellate review. The court went far beyond the words of the state statute, Section 300.10(2) CPL, by affirmatively noting, repeatedly, that the petitioner had a clear right under law to testify as a witness in his own behalf but did not exercise that right. (Compare, DeVitt and Blackmar, "Effect of Failure of Accused to Testify," Federal Jury Practice and Instructions (§12.10). By expanding on the statutory language, Williams' rights under the Fifth Amendment were prejudiced.

(c)

The New York Court of Appeals in People v. McLucas, 15 N.Y.2d 167, 171, 256 N.YS. 2d 799 (1965) recognizing this potential prejudice has pointedly noted:

> "This court long ago warned that: 'In the trial of a criminal case it can never be necessary to add anything to the plain and simple language of the statute' (now Section 300.10(2) of the CPL) that any statement of a Trial Judge which tends to deprive a defendant of the full protection of the statute is reversible error and that the force of the constitutional protection is not to be weakened by qualifying words (see People v. Fitzgerald, 156 N.Y.253, 266; People v. Forte, 277 N.Y. 440, 443; People V. Manning, 278 N.Y. 40, 44)."

In Manning, id. at 278 N.Y.40, 15 N.E.2d 181 (1938) the defendant did not testify for himself. As to this, the trial judge charged the jury: "Now, the law says that a defendant has the right to take the stand as a witness in his own behalf but for his failure or refusal to do so no inference of guilt shall be drawn against him. That means just what it says. The judge is not permitted to comment on it." "This," instruction, the Court of Appeals held, "was error", which required the reversal of the conviction and a new trial.

This was the ruling that had been reaffirmed, twenty-seven years later, in McLucas, supra.

In Johnson v. United States, 318 U.S.189, 196-197 (1943) the Supreme Court held that when the privilege of the Fifth Amendment is exercised "the requirement of fair trial may preclude any comment. ... The allowance of the privilege would be a mockery of justice, if either party is to be affected injuriously by it." This decision was expanded upon by the Court in Griffin v. California, 380 U.S.609, 613-14, reh. den., 381 U.S. 957 (1965) wherein it was noted that "comment on the refusal to testify is a remnant of the 'inquisitorial system of justice' which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly."

Such comment, however, may take several forms and be equally costly. Just as no presumption may arise even for a defendant's failure to testify as to facts peculiarly within his knowledge - the practice prohibited by Griffin directly - so too, by affirmatively emphasizing to a jury an accused's clear, absolute right to testify when he declines to do so, the same prejudicial result is achieved. For as the Court reasoned in Griffin, supra at 614: "what the jury may infer, given no help from the court, is one thing.

What it may infer when the court solemnizes the silence of the accused ... is quite another."

Most recently, in People v. Garcia, NYLJ, April 2, 1976, at 1, col. 6 (App. Div., First Dept., decided March 23, 1976) the court in charging on the subject of interested witnesses addressed the jury as follows:

> "An interested witness is one who is personally concerned in the outcome of the litigation ... the defendant would be an interested witness."

Justices Capozzoli and Birns, in dissent, held:

> "It is impossible to understand why this last sentence was necessary to give to the jury. Everyone knew the defendant had not taken the stand and by specifically referring to the defendant as an interested witness if he had taken the stand, which he did not, the court obviously must have caused some of the jurors, if not all, to wonder why he did not take the stand. It is difficult to believe that this resulted in no prejudice to the defendant. We are forced to the conclusion that defendant was indeed prejudiced in the eyes of the jury and was denied his constitutional rights to a fair trial. Therefore, since ordering a new trial does not release the defendant but merely insures that justice will

> be done, we conclude that there should be a reversal and a new trial held in the interests of justice.
>
> We have noted that the majority has referred to the subsequent statement of the Trial Court to the effect that no inference was to be drawn from the failure of the defendant to take the stand. The damage has already been done and this subsequent statement did not help. In fact, it may have had the effect of emphasizing such failure to testify in the minds of the jurors."

The dissenting Justices' reasoning in Garcia is particularly applicable herein. First, the petit jury was told that the petitioner actually testified before the grand jury. Then it was told that as a result of such testimony, the grand jury accused him of having perjured himself. Finally, at trial, the Court repeatedly informed the jury of the petitioner's clear right to testify before it - which right the petitioner chose not to exercise. This obviously caused the jurors, in the words of Mr. Justice Capozzoli in Garcia, "to wonder why he did not take the stand." "The damage has already been done and this subsequent statement (that no inference was to be drawn from the failure of the defendant to take the stand) did not help. In fact, it may have had the effect of emphasizing such failure to testify in the minds of the jurors." As Mr. Justice Jackson has stated in a similar matter: "The naive assumption that prejudicial effects can be overcome by instructions to the jury ... all

practicing lawyers know to be unmitigated fiction." Krulewitch v. United States, 336 U.S. 440, 453 (1949).

This argument is further supported by Redfield v. United States, 315 F.2d 76, 80 (9th Cir. 1963) wherein it was held that the privilege against self incrimination "may be violated by an official statement in the presence of the jury that the defendant is entitled to testify (McKnight v. United States, 6 Cir., 115 F. 972...." (Emphasis added). The Court of Appeals for the fifth circuit accepted this in Davis v. United States, 357 F.2d 438, 440-41 (5th Cir. 1966):

> "Just as it is improper for the prosecutor to argue from defendant's silence, so is it improper for the trial judge to call attention to a defendant's silence."

The trial judge herein did just that: call attention to the petitioner's silence by charging that the court wanted to "make it clear to you that under our law the defendant may testify as a witness in his own behalf. In this case the defendant did not take the stand in his own behalf...." Compare, Chief Judge Mishler's explicit and repeated instructions in United States v. Brown, 511 F.2d 920, 925 (2d Cir. 1975).

A jury may be charged, in the negative, and when requested by defense counsel, that in a criminal trial every defendant has an absolute right not to testify, and that the jury must not draw any inference of guilt by virtue of the exercise of such right. United States v. Williams, 521 F.2d 950, 954-55 (D.C. Cir. 1975); see Bruno v. United States, 308 U.S. 287 (1939); United States v. Cervantes-Gonzalez, 472 F.2d 611, 612 (9th Cir. 1973). However, and particularly in a situation where a defendant testified before a grand jury and is on trial before a petit jury as a result thereof, a jury may not be charged, in the affirmative, that the defendant has a clear right under law to testify before the petit jury, when the defendant chooses to exercise his constitutional right not to do so. This prejudices a defendant's rights by causing the petit jury to speculate as to why he didn't exercise this clear right before them, when he chose to do so before the indicting grand jury. Once the damage was done, the trial judge's reference to the wording of the statute, CPL Section 300.10 (2), that "the fact that he did not testify is not a factor from which any inference whatsoever unfavorable to the defendant may be drawn," could not cure the prejudice, but only further exacerbate it.

(d)

The privilege against self-incrimination not only forbids

employment of the judicial process to require a defendant to testify, but "also forbids the court or the prosecution from placing the defendant in a position where he must testify in order to avoid an adverse inference on the part of the jury" (Emphasis added). Redfield v. United States, supra at 80.

As previously discussed, in response to defense counsel's remarks on the failure of the prosecution to present any evidence on either the issue of who was the owner of the blue Dodge involved in the accident, or the identity of its driver on the day in question, the prosecutor in summation stated expressly that the owner "could have been ... the defendant," and further that just as the prosecution could have discovered the owner of the car, so also could the defendant. He noted that although the defendant didn't have to, "he could if he wanted to."

The defendant was thus placed in a position of being challenged for his failure to testify or offer proof either to the effect that he was the owner of the Dodge or its driver. In Chapman v. California, 386 U.S.18 (1967) the Court held that to allow a prosecutor to comment upon a defendant's failure to testify is not harmless, but substantial error requiring reversal of a conviction.

Whether the jury interpreted the prosecutor's remarks as a comment upon Williams' failure to either testify to the effect that he was the owner and driver of the Dodge, or offer other proof to

establish these facts, the effect was the same: to infringe and prejudice petitioner for the exercise of his constitutional right. See, United States v. Flannery, 451 F.2d 880 (1st Cir. 1974); United States v. Smith, 500 F.2d 293 (6th Cir. 1974).

Gratefully, the Supreme Court in Chapman, id. at 24, also supplied the test for assessing the effects of the comments of the prosecutor and the trial judge herein:

> "In order for an error involving the denial of a federal constitutional right to be held harmless in a state criminal case, the reviewing court must be satisfied beyond a reasonable doubt that the error did not contribute to the defendant's conviction."

Under the circumstances of this case, it is respectfully submitted that this Court cannot be satisfied beyond a reasonable doubt that the errors complained of herein did not contribute to Williams' conviction.

IV. CONCLUSION

In order to insure and protect the constitutional right to a fair trial, as embodied in the Fifth Amendment, it is most respectfully submitted that the practice of affirmatively informing a jury

of a defendant's clear right to testify as a witness in his own behalf and of the fact that he chooses not to exercise such right, must, in particular, be proscribed for all time.

Accordingly, the order of the District Court denying the writ of habeas corpus should be reversed, the judgment of conviction annulled and a new trial ordered in the interests of justice.

Respectfully submitted,

HAROLD B. FONER and
IRA LEITEL, ESQS.

Attorneys for Petitioner-
Appellant Williams

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CALVIN WILLIAMS,
Petitioner- Appellant,

- against -

ATTORNEY GENERAL et.al.,
Respondents- Appellees.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF **NEW YORK** *ss.:*

I, James A. Steele *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 310 West 146th Street, New York, New York

That on the **9th** *day of* **April** *19* **76** *at* **see attached**

deponent served the annexed **Appendix Brief** *upon*

see attached

the **Attorneys** *in this action by delivering* ~~a~~ 2 *true copy* 5 *thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein.*

Sworn to before me, this 9th *day of* **April** *19* **76**

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

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